Lamoine Board of Appeals
606 Douglas Hwy
Lamoine, ME 04605
(207) – 667-2242
town@lamoine-me.gov

Minutes of April 27, 2011

Chair Hancock "Griff" Fenton called the meeting to order at 7:00 PM

Present were: Appeals Board members James Crotteau, John Wuorinen, Jay Fowler, Hancock Fenton, Alternate Merle Bragdon, Alternate Jon VanAmringe; Secretary Stuart Marckoon, Planning Board Chair John Holt, Planning Board members Michael Jordan, Donald Bamman, Chris Tadema-Wielandt, James Gallagher, Appellant's attorney Michael Ross, Surveyor Stephen Salsbury, Cliff Lippett of SW Cole, and abutters James Moore, Tammy Moore and Cheryl Curtis.

The meeting was telecast live and recorded on DVD.

Chairman Fenton acknowledged the passing of former board alternate Reggie McDevitt, noting it was a shame to lose a valued community member.

Minutes of February 21, 2011 – Mr. Crotteau moved to approve the minutes as distributed. Mr. Wuorinen 2nd. **Vote in favor was 5-0.**

Gott v. Lamoine Planning Board – Chairman Fenton provided a brief chronology of the case. He said

- In December 2010 the Planning Board held a hearing on a site plan review and gravel permit application from Doug Gott & Sons, Inc.
- On January 5, 2011 the Planning Board denied both permits.
- On February 3, 2011 the appeal was filed by Mr. Ross representing Mr. Gott. There were four outstanding issues identified in the filing.
- On February 21, 2011 the Board of Appeals met and set tonight's meeting date.

Mr. Crotteau asked which alternate member would be voting in the absence of member Nicholas Pappas who had phoned to let the Board know he could not attend this evening. Chairman Fenton said it should be Mr. Bragdon as Mr. VanAmringe was not part of the board and not present at the previous meeting. Mr. Crotteau so moved, Mr. Wuorinen 2nd. **Vote in favor was 4-0.**

Chairman Fenton then opened the public hearing.

Appellant Presentation – Attorney Michael Ross said he represents the appellant, Doug Gott and Sons, Inc. He said before they get into why they filed the appeal, he looked over the hearing procedure and wanted to stress the importance that the hearing be based on evidence that was before the Planning Board, not on any new evidence. He cited the Maine Law Court case Stewart vs. Sedgwick (which is part of the file on this matter).

Mr. Ross said the Board of Appeals must rely on the lower tribunal, the Planning Board. He said the Planning Board did write out the reasons to deny the application for both permits. He said all the information has been submitted to the Board of Appeals, including the application, the denials, the document dated January 5, 2011 from the Planning Board, the notice of appeal, a summary of the arguments, the plan and the town ordinance. He said he heard noted just prior to the start of the meeting that the Board of Appeals was working from ordinances that were updated on March 16, 2011. He said he was comfortable using those versions of the ordinances as none of the changes approved at the 2011 town meeting affected matters before the Board.

Mr. Salsbury showed the Board the map prepared for the Planning Board. He pointed out the landscape and buffer zone, and said the blue and green areas on the map represent the mined and open areas. He said there is a steel building on the parcel, and he explained where the requested expansion is located, explaining the proposal is to move the boundary of the active pit. He said the orange areas show the start of the restoration effort.

Mr. Salsbury said the lot is adjacent to the Moore's house lot. He showed a second chart which depicted the proposed restoration plan. He said those walking by the property would not see into the pit thanks to the proposed berm. He said there is also a buffer next to the highway (Route 184). He explained the footprint of the proposal, and it would not be adversely affecting the groundwater of the neighbors.

Mr. Crotteau asked to what extent there would be gravel extraction vs. storage. He said he was not clear on what Mr. Gott was proposing. Mr. Salsbury said immediately there would be 30-feet of gravel extraction. He said it would then revert to a storage area. He said Mr. Gott leases 30-acres of land, but the lease has ended and that area will be restored. He said Mr. Gott is attempting to make up for the lost lease area and needs 3-4 acres by the road.

Mr. Wuorinen asked where the material to be stored is coming from. Mr. Salsbury replied it would be from adjacent areas.

Mr. Ross said the Planning Board went through the Site Plan Review Ordinance Review criteria which has a list of 20-things to be considered. He said they approved the application on all but two items. He said there was a tie vote on the criterion that requires preservation and enhancement of the landscape. He said it's his opinion that the Planning Board misinterpreted item J1 of the Site Plan Review Ordinance and read the standard:

> *The landscape shall be preserved in its natural state insofar as practicable by minimizing tree removal, disturbance of soil, and retaining existing vegetation during construction. After construction is completed, landscaping shall be designed and planted that will define, soften or screen the appearance of the development and minimize the encroachment of the proposed use on neighboring land uses.*

> *Environmentally sensitive areas such as aquifers, significant wildlife habitat, wetlands, steep slopes, floodplains, historic buildings and sites, existing and potential archaeological sites and unique natural features will be maintained and preserved to the maximum extent.*

He said the Planning Board made no findings of fact on the standard to preserve landscaping. He said the decision from the Planning Board focused on a cost-benefit analysis as to whether it was a cost to the surrounding properties. He said that is not what the statute mandates. He said the ordinance criterion only concerns landscape preservation. He said a review of the January 5, 2011 findings does not address that issue at all. He said the findings ask whether there was a good trade off, and read from the Planning Board findings.

Mr. Ross said this is not a finding in accordance with the mandate of criterion item J1. He said the tie vote of 2-2 is not a clear decision. He said a legal organization called MacQuillan says a tie vote actually favors a vote in favor of a motion. He said those present and not voting are presumed to be voting in the affirmative. He said the Planning Board failed to make the proper findings, and the vote was one of affirmation, not denial.

Mr. Ross said the only other item against the Site Plan Review permit was item 16 which relates to the Comprehensive Plan. He said he reviewed the section. He said the Comprehensive Plan is not the rule book; it is a guide, a vision for what the town ought to be like. He said the Comprehensive Plan is not regulatory but a general statement, and cited Nestle v. Fryeburg (a part of this case file). He said the Comprehensive Plan requires the town to come up with an ordinance that the applicant can understand. He said an applicant cannot understand the Comprehensive Plan. He said it is improper to regulate compliance with the Comprehensive Plan. He said the review criteria are all part of the Comprehensive Plan, and the review for compliance with the plan is redundant.

Mr. Ross said he believes the Planning Board action is unconstitutional. He said he rarely uses the word unconstitutional, but the standards of the Comprehensive Plan are vague. He cited the case of Kosalka v. Georgetown (also a part of this case file).

Mr. Ross said the report from the Planning Board talks about the Comprehensive Plan and the amount of property that Gott owns. He said that report is all over the place. He said there is no articulable standard that anyone could know or satisfy. He said the decision of the Planning Board came down to whether this was a worthy project. He said that put an unreasonable burden on the application because they don't know what they have to satisfy. He said item #16 needs to be deleted from the ordinance because it is unconstitutional. He said the Gott Site Plan Review application should be approved by the Board of Appeals and Planning Board review items # 1 and #16 should be over-ruled because the Planning Board decision was based on a mis-interpretation.

Mr. Ross said the Gravel Ordinance has 7 review criteria. He said the Planning Board found the applicant met five and failed two of them. He said item #4 of the findings has to do with conserving natural beauty. He said beauty is in the eye of the beholder. He

said trees and grass are beautiful, and if every ordinance were interpreted with that standard, nothing could ever be built. He said the gravel ordinance says natural beauty has to do with the restoration provisions in the ordinance. He said the writers of the ordinance knew there would be holes in the ground, and they envisioned a certain type of restoration. He said that is what the ordinance calls for. He said the Planning Board interpreted this section without regard to the restoration standards and buffering. He cited the case of Kosalka v. Georgetown, saying this is an unmeasurable quality and an unconstitutional delegation of authority. He said the exact same terminology is contained in this ordinance.

Mr. Ross said the other ground for denial was review criterion #6, that the project adversely affects surrounding property. He said the Planning Board misinterpreted this requirement. He said there were no findings of fact on the impact on surrounding properties. He said the Planning Board wrote another cost/benefit analysis. He said the need for a pit is not the standard. He said this is a very clear item. He said the need for a pit is not relevant in regard to the effect on surrounding properties. He said the decision should be overturned and the gravel permit approved by the Appeals Board.

Mr. Crotteau asked Mr. Ross if it's his believe that the Comprehensive Plan cannot be used at all. Mr. Ross said referencing the Comprehensive Plan as a criterion is vague, and that is the problem. Mr. Crotteau asked if there was anything in the Site Plan Review Ordinance to prevent heavy industrial operation anywhere in the town. Mr. Ross said he did not know. Mr. Crotteau said the provisions of the Comprehensive Plan deal with zoning and were not taken out of context. He said if one looks at the Site Plan Review Ordinance, there is no provision in there other than the Comprehensive Plan to deny a large industrial project in any particular part of the town. He said that is the only provision in the Site Plan Review that could prevent that. Mr. Ross said the Comprehensive Plan is the critical document from which regulatory ordinances are made. Mr. Crotteau asked if the Comprehensive Plan reference contained in the Site Plan Review Ordinance could be the shorthand the town used to add the items for review. He said if the town says do what the Comprehensive Plan says, how is that different than including all the language from the Comprehensive Plan in the ordinance. Mr. Ross said the Comprehensive Plan covers everything and asked how an applicant is supposed to know which piece of the Comprehensive Plan to pull from. Mr. Crotteau said an Appeals Board decision last summer referred to the Comprehensive Plan and the zoning provisions contained within it. He said those provisions are specific. He said the Site Plan Review Ordinance refers to other ordinances, and specifically the gravel ordinance. He said the town is using shorthand with that, too. He said he doesn't see how the Planning Board could deny any heavy industrial use anywhere in town under the Site Plan Review Ordinance. Mr. Ross said that was not in his area of review.

Chairman Fenton said the Nestle v. Fryeburg decision says the Comprehensive Plan is visionary, even if it contains specifics. He said it is up to the towns to incorporate the Comprehensive Plan into the ordinances, so when the specific requirements of the plan are related to the ordinance, there is a measurable standard. He said there are two or three cases that say the Comprehensive Plan is not to be used. He noted that a letter from the town attorney received earlier in the day gave advice on that matter. Mr. Crotteau said the Nestle v. Fryeburg case is distinguished from Lamoine's ordinance

because the reference to the Comprehensive Plan is not written into Fryeburg's but is written into Lamoine's. He read an excerpt from the Comprehensive Plan. He said he thinks the Comprehensive Plan is pretty specific in contrast to section J2 of the Site Plan Review Ordinance that contains language that is much vaguer than the Comprehensive Plan. He said the Planning Board is the body to make that interpretation. He said he is still looking for an answer where a heavy industrial use could be denied anywhere in town other than by the Site Plan Review Ordinance reference to the Comprehensive Plan. A discussion between Chairman Fenton and Mr. Crotteau ensued in regard to the Comprehensive Plan. Chairman Fenton asked when the Comprehensive Plan was put together. Mr. Crotteau said it was 1996. Chairman Fenton said ordinances are living documents, and the Planning Board works extremely hard in reviewing them and proposing changes when needed. He said the courts have found that Comprehensive Plans are not as flexible as an ordinance.

Planning Board

Planning Board Chairman John Holt said the Board of Appeals and the appellants have had the reasons for denial for some time, and the presentation tonight was sent via e-mail to the parties. He read the following statement:

On behalf of the Planning Board, Town of Lamoine, I wish to submit the following testimony in response to Doug Gott & Son, Inc.'s February 3, 2011 appeal of the Planning Board's January 5, 2011 decision to deny Doug Gott & Son, Inc. a Site Plan Review permit and a Gravel Extraction permit for a proposed project named 'B&H Pit Expansion' located on Map 3, Lots 6 & 8.

I. SITE PLAN REVIEW ORDINANCE

A. With regard to Review Standard 1 of the Site Plan Review Ordinance, the appellant raises two objections:

1. While noting correctly that two members of the five-member Planning Board voted to find that the appellant had met Review Standard 1, two others voted that the Review Standard 1had not been met, and one abstained from voting, the appellant asserts that this constitutes a "tie" vote and that this "tie vote" is to be interpreted as a vote in favor, not a vote in opposition. In support of this surprising conclusion, the appellant cites 'a noted authority on municipal corporations.'

The Planning Board endeavors to conducts its business under guidelines recommended by the Maine Municipal Association in its handbook Manual for Local Planning Boards: A Legal Perspective (October 1999 edition), where, on pages 29-30 and in a section titled Approval and Form of Decision, is found the following: "Tie Votes. If a motion results in a tie vote, the board has failed to act and another vote should be taken to try to get a definitive decision. If the tie cannot be broken, it probably should be treated as having the same effect as a vote to defeat the motion." The Planning Board thus believes that it interpreted the meaning of the tie vote correctly, as failure to approve.

2. The appellant asserts that the Planning Board "conducted a wholly irrelevant comparison between the benefits of the pit to the landowner and the costs to surrounding

properties" and "made absolutely no findings of fact relating to whether the project will preserve natural landscaping 'as much as is practicable.' "

The Planning Board, in response, would reiterate that the Site Plan Review Ordinance obligates the Town to "protect the health, welfare and safety of the residents of the town of Lamoine" and "to balance the rights of landowners to use their lands with the corresponding rights of abutting and neighboring landowners to live without undue disturbances from nuisances such as, but not limited to, noise, smoke, fumes, dust, odor, glare, traffic, storm water runoff or the pollution of ground or surface waters…" (Site Plan Review, Section F. Purpose)

A discussion concerning the rights of the appellant to expand an existing gravel pit into a six-acre virtually untouched parcel directly abutting three residences (and more generally adjacent to the one of the more densely built-up areas in Lamoine [Mill Road and portions of Lamoine Beach Road])) and the rights of these residents of Lamoine can hardly be dismissed as a "wholly irrelevant comparison." It is central to the Planning Board's responsibility.

No proposed construction project is quite as extensive in its maximization of tree removal, disturbance of soil, and removal of existing vegetation as is the creation of a gravel pit. In this case, since the proposed use of the pit would be essentially the storage of materials brought from other locations, the Board felt the proposed scope of the alteration of the landscape in its natural state was of sufficient importance to justify denial of the expansion into this area.

B. With regard to Review Standard 16 of the Site Plan Review Ordinance, the appellant raises three distinct objections:

1. The appellant argues that Review Standard 16 and the Board's application of it is unconstitutional and cites Nestle Waters North America, Inc. v. Town of Fryeburg to support his assertion. As I testified to this Appeals Board in June of 2010 when the Board heard this very argument from the same appellant, Lamoine's Site Plan ordinance is substantially different from that of the Fryeburg's in that it specifically names and cites Lamoine's Comprehensive Plan as a particular Review Criterion, a particular standard with which any proposed land use must comply. The Planning Board acted properly in applying this review standard of conformance with the Comprehensive Plan, for the standard is expressly written in the Site Plan Review Ordinance.

In any event, it is not within the authority of the Appeals Board to make a judgment as to the constitutionality of Review Standard 16. That is a judgment for the Courts to make.

2. The appellant asserts that the Planning "Board expressly stated that a basis for denying the application is the fact that the Applicant is a commercial business that owns other property." Such an assertion is without merit. The basis for denying the application is the Board's determination that the application failed to meet Review Standards 1 and 16. The appellant has been granted many gravel permits in the Town of Lamoine by the Planning Board.

3. In the event that Review Standard 16 might be constitutional, the appellant argues that because gravel pits are expressly contemplated by the Comprehensive Plan they are, "thus, ' in conformance' with it." The Planning Board does not dispute that the Comprehensive Plan acknowledges that extraction of sand and gravel may take place within the Rural and Agricultural zone. In fact, the Planning Board has issued many gravel extraction permits in the past year to the appellant and others.

The issue is not whether gravel pits always or never must be permitted within the R&A zone, but under what conditions. The fact that gravel extraction permits are subject to the Site Plan Review Ordinance suggests that a gravel extraction proposal must be evaluated within its

larger contexts of the area in which it is proposed, Lamoine as a whole and the Town's vision for itself as a community. The fact that the citizens of Lamoine, through the Site Plan Review Ordinance, give authority to the Planning Board to issue or deny gravel extraction permits suggests that the community's judgments as to appropriateness of the location, scope and activity within any single pit are factors to be considered when assessing the pit's impact on the 'health, welfare, and safety of the residents of the town of Lamoine."

The Board is not contending that all gravel pits are not in conformance with the town's Comprehensive Plan. It is contending that the appellant's expansion of the B&H pit into Lot 8, Map 3 (the Stephens' property, so-called), is not in conformance, for the reasons noted in the denial dated January 5, 2011.

II. GRAVEL EXTRACTION PERMIT

A. With regard to Review Standard 4 the appellant asserts that the Planning Board's interpretation is unconstitutionally vague. The court case cited, Kosalka v. Town of Georgetown, however, is not concerned with the vagueness of an interpretation, but the vagueness of a standard written into the ordinance. The appellant is not arguing that Review Standard 4 is vague. Thus, the citing of the court case is inappropriate and irrelevant; further, alleged matters of unconstitutionality are not within the scope of the Appeals Board authority to determine.

The appellant states that the Planning Board failed to consider whether the restoration provisions of the ordinance were met. That is not accurate. The Board reviewed the restoration plans of the applications and found them to be satisfactory. The majority of the Board felt, however, that overall loss of loss of natural beauty, even with satisfactory restoration plans, was too significant for the abutting and neighboring properties.

B. With regard to Review Standard 6, the appellant asserts that there are no findings of fact to support the Board's conclusion that surrounding properties will be adversely affected. It is clear, in retrospect, that the Board should have stated, clearly and in detail, what seemed to the Board to be self-evident, namely, that expanding a gravel pit to a parcel which abuts three existing residences will result in more noise, more dust, more potential for pollution, more fumes from the operation of equipment and lower market values for those abutting and many other neighboring properties. Surrounding properties clearly will be affected and, clearly, adversely.

The Board felt obliged to discuss the 'value' of the proposed expansion of the B&H pit in an effort to compare it to the 'value' of the adverse effects on abutting properties. Such an analysis is not 'wholly inappropriate and irrelevant' as the appellant asserts, but quite appropriate and relevant.

Mr. Crotteau asked if there were any provisions in the Site Plan Review Ordinance to prevent placement of heavy industry anywhere in town. Mr. Holt said if all of the technical conditions were met, the Planning Board would be compelled to issue a Site Plan Review permit. He said the Comprehensive Plan provision provides the only place for the larger view, unless such an activity was excluded under the table of land uses (in the Building and Land Use Ordinance). Chairman Fenton asked what would happen if the Comprehensive Plan did not exist and the Planning Board put together a zoning plan for the town. Mr. Holt said anything could be done. He said the town is the legislative body.

Chairman Fenton asked if abutting landowners would be a cause for approval or denial. Mr. Holt said location is the big factor in this case. He said the proposal is located in a

residential area, and there are already several hundred acres opened up. Chairman Fenton said people are concerned about arbitrary decisions being made, and change sometimes has merit. He said the Comprehensive Plan aims for a balance between the residential area and the gravel pits. Mr. Holt said specificity would be desirable in many ways. He said if an item is not specific or legislated or written into case law, they could write a 70-page ordinance instead of one that is flexible. He said the process allows the 5 to 7 members of the Planning Board, the public and, in this case, the Appeals Board to weigh in on applications. He said the system is built to prevent arbitrary decisions.

Mr. Fowler said if the proposal from Gott went as designed, the visibility of the operation from Route 184 would be no different than it exists now. He asked how there would be a difference. Mr. Holt said the Planning Board took no issue with the restoration plan. Mr. Fowler asked if the main concern was visibility. Mr. Bamman said there are noise and dust concerns as well.

Abutter Tammy Moore said Gott clear cut the lot, leaving about 25 trees, and 20 of those trees blew down in the last wind storm. She said they were blocked in their house for the day, but Gott did come to help haul the trees out of the way. She said the trees did a number on their lawn and garden. Mr. Fowler said there is supposed to be a 50-foot setback. James Moore said they did leave a 10-foot setback. Mrs. Moore said the wind blew the trees down. Mr. Moore said there is no buffer now. Mr. Holt said the setback can be reduced to 10-feet, and the landowner can clear out trees if they desire.

Mr. Ross said the Appeals Board is not to hear new evidence. Mr. Fowler said the restoration plan might offer a better view and less noise with the proposed berm. Mrs. Moore asked what would keep the new trees in place. Chairman Fenton said that was not relevant, but if trees were planted, they would probably stay.

Public Comment

Mrs. Moore said they are concerned with their privacy, the noise, and their property values. Mr. Crotteau asked if Mr. & Mrs. Moore were present at the Planning Board meeting. Mrs. Moore said they were not. Cheryl Curtis said she also lives nearby, and is worried about excessive noise and water quality. She said the last time this issue came up she asked to have a Hidden Drive sign installed, which the Maine DOT did, and that has helped a lot with trucks slowing down. She said she is still concerned about added traffic and noise. Chairman Fenton said there are time limits and noise limits imposed on pits, which help to keep the balance.

Rebuttal

Mr. Ross said the Building and Land Use Ordinance regulates where certain things are permitted, but he has not studied that. He said he would like to return to the Nestle v. Fryeburg case and read a section from it. *The Comprehensive Plan and the land use ordinance are complementary, but their purposes are different. The plan sets out what is to be accomplished; the ordinance sets out concrete standards to ensure that the plan's objectives are realized. The two are not meant to be interchangeable.*

Mr. Ross then read a section of Kosalka v. Georgetown: *Because the condition that all proposed developments "conserve natural beauty" is an unmeasurable quality, totally lacking in cognizable, quantitative standards, this condition is an unconstitutional delegation of legislative authority*

Mr. Holt said Mr. Ross was misrepresenting both cases. He said in the Fryeburg case, the Superior Court told the Planning Board it could use the Comprehensive Plan to deny the permit, but there was no reference to the Comprehensive Plan in the ordinances. He said Lamoine names the Comprehensive Plan as a review standard. He said whether that is constitutional or not is for someone else to decide.

Mr. Holt said in the Kosalka case, the standard was to conserve natural beauty only, and that wouldn't hold up. He said Lamoine does not have that standard, so it's a different ballgame. He said this matter is not up to the Appeals Board, but is up to Superior Court.

Chairman Fenton asked if it is possible to find that the Planning Board erred in using the Comprehensive Plan standard. Mr. Holt said it could find an error in the interpretation of the Comprehensive Plan, in theory. Chairman Fenton asked how often the Planning Board looks at the Comprehensive Plan. He said a lot has changed since 1996 and asked if anything is done on a yearly basis. He asked if there is another one coming. Mr. Hold said they have talked about it, and the Comprehensive Plan was used to deny an application a year ago, so it's reasonable to expect that it would be used.

Mr. Jordan said it is a major undertaking to change the Comprehensive Plan, as it has to be sent to the state for certification. He said Comprehensive Plans expire after 10-years. He said some items could still be legal, but the state does not recognize the plan. He said the state required towns to make Comprehensive Plans to deal with sprawl and growth. Mr. Gallagher said the plan was passed with a series of statements about what is desired by the town. He said the ordinance is clear, the Planning Board must take into account what the Comprehensive Plan says, and they have no choice. He said the Planning Board found the proposal violated what the Comprehensive Plan says.

Chairman Fenton said ordinances are documents that change. He said he just wanted to see how the Comprehensive Plan is changed.

Mr. Fowler said when the Gravel Ordinance was revised in 1989 he warned that some of the standards were vague and that it would make a difference of who is on the Planning Board. He said this is the first pit denial in 22 years. He said the term natural beauty is playing with opinions and the deck is stacked. He said the rest of the criteria are met, and now natural beauty is the only discussion. He said the town has tried to drive business away with this ordinance, and this decision is setting a precedent.

Mr. Tadema-Wielandt said this is the first time since 1989 that a permit was sought for this parcel. He said this item was not used in the past because the board found the previous parcels did not have an issue with natural beauty. Mr. Fowler asked why this proposal was different from the others.

Mr. Wuorinen moved to close the hearing. Mr. Crotteau 2nd. **Vote in favor was 5-0.**

Chairman Fenton said the Appeals Board received a letter from the town attorney today after a request for guidance in regard to such cases. He said after reading the letter, he believes that a majority vote of 3 is needed to pass, and suggested that the Planning Board could reconsider the 2-2 tie vote. He said it might be a good idea for the Planning Board to explore the tie vote issue. He said the town attorney mentioned the Comprehensive Plan, and said there could be a problem with using the Comprehensive Plan as a review criterion. He said the town attorney gave advice on the vagueness of the natural beauty issue. He thanked the Selectmen for allowing the Appeals Board to seek the legal help.

Mr. Bragdon said he did not get a packet to review the matter. Chairman Fenton said Mr. Bragdon needs a packet, and the meeting should be recessed until a later date. After a short discussion it was agreed to reconvene at 7:30 PM on April 28, 2011.

Reconvened Meeting Minutes – April 28, 2011

Present for this meeting were Appeals Board members John Wuorinen, Hancock "Griff" Fenton, Merle Bragdon, Jay Fowler, Jim Crotteau; Secretary Stu Marckoon, Michael Jordan and John Holt.

Chairman Fenton reconvened the meeting at approximately 7:30 PM. This meeting was televised live and recorded on DVD.

Chairman Fenton said the meeting would continue where it left off last night and probably each issue should be taken up individually in the administrative appeal.

Site Plan Review Standard J1
Chairman Fenton read from the Site Plan Review Ordinance, Section J1 as follows:

> *The following criteria and standards shall be utilized by the board in reviewing applications for site plan review approval. The standards are not intended to discourage creativity, invention and innovation. The board may waive the criteria presented in this section upon a determination by the board that the criteria are not applicable to the proposed action or upon a determination by the board that the application of these criteria are not necessary to carry out the intent of this ordinance. The board shall approve the application unless the proposal does not meet the intent of one or more of the following criteria provided that the criteria were not first waived by the board.*
>
> *1. Preserve and Enhance the Landscape.*
>
> *The landscape shall be preserved in its natural state insofar as practicable by minimizing tree removal, disturbance of soil, and retaining existing*

vegetation during construction. After construction is completed, landscaping shall be designed and planted that will define, soften or screen the appearance of the development and minimize the encroachment of the proposed use on neighboring land uses.

Environmentally sensitive areas such as aquifers, significant wildlife habitat, wetlands, steep slopes, floodplains, historic buildings and sites, existing and potential archaeological sites and unique natural features will be maintained and preserved to the maximum extent.

Chairman Fenton gave a synopsis of the hearing arguments by both the appellant and the Planning Board.

Mr. Wuorinen said the Planning Board seems to make sense. Chairman Fenton asked if Gott had not applied for a permit, could he cut down the trees anyway? Mr. Marckoon said no permit is required to cut trees in this zone. Chairman Fenton said the restoration effort is subjective and the Planning Board may want to look at it. Mr. Crotteau said it would be nice if the Appeals Board could tell the Planning Board what to do. He said the problem with any ordinance is that the principles to apply cannot regulate everything. He said it would be helpful for some group to look at the Site Plan Review and the Comprehensive Plan to give them more specificity. Mr. Bragdon said when the ordinance and plan were crafted, they could not anticipate every situation. He said the review criterion allow for conditions to be placed instead of denial. He said section J1 almost seems irrelevant for a gravel pit. He said a gravel pit rips everything out instead of constructing something He said there was a plan for a berm and trees and a 50-foot setback. He asked if that was not satisfactory, why conditions were not placed instead. He asked about denying without placing conditions.

Chairman Fenton said he found the sentence that deals with waiving review criteria interesting. He said section J1 seems to deal with a building of some sort. He said if the town wanted to control and protect, for instance, parcels on the aquifer, it would benefit the community to show where certain activities are acceptable or not. He said there was some reference in the Comprehensive Plan. He said at some time there must be a balance of the rights of pit owners versus the rights of landowner protection.

Mr. Wuorinen said he was not familiar with all the gravel permits that have been issued, but is familiar with a few cases and the restoration plans are fairly specific. Mr. Bragdon said this application has a specific restoration plan. Mr. Wuorinen said that is generally taken care of in the Planning Board process. He said his other concern with what is requested takes place on top of the aquifer. He said restoration does not replace the top burden which is essential for purifying water. He said the history of restoration is not very good, and it's a fairly strong argument in this case.

Chairman Fenton said the proposed area is adjacent to a present pit, and they are all on top of the aquifer. Mr. Bragdon said a pit is considered an entire piece of land. Mr. Wuorinen said the appellant is asking for a permit to mine gravel. Mr. Bragdon said the Planning Board did not turn down the application based on the aquifer location.

Chairman Fenton said the appellant can take down trees without a permit. Mr. Wuorinen asked what the state position is regarding a clear cut. Mr. Crotteau said that is not the Appeals Board issue. He said anytime you do anything you are going to diminish the landscape. He said the Site Plan Review Ordinance tries to balance that. He said when he read the Planning Board's decision, it seemed like that is what they were trying to do, strike a balance. He said otherwise, no one would ever be able to do anything. He said the Planning Board has a very difficult job.

Mr. Fowler said there was a nice bunch of trees between Route 184 and the pit and a 50-foot setback plus the required slope would put the proposed pit 125 feet from the property line. He said he wondered why they would cut the trees and build a berm instead of leaving a tree buffer. He said when the gravel ordinance was enacted, the town should have enacted an ordinance to regulate wood cutting too. Chairman Fenton asked what prevents gravel storage now that the trees have been cut. Mr. Crotteau said nothing, and he probably would not need a permit Mr. Wuorinen said the appellant's surveyor said they were going to mine the land. Mr. Bragdon said the permit application indicated storage from time to time. Mr. Fowler said storage is no problem. He said if you look at the property and a 30-foot head of gravel, it will be excavated below where the adjacent pit is now.

Chairman Fenton said the balance of the needs of the company and the needs of the community is difficult. He said Gott lost 30-acres of leased land. He said having the Planning Board determine what Gott needs or doesn't need is interesting and sends a warning to him. Mr. Wuorinen said it seems the financial interest of the neighbors is difficult to pin down. Chairman Fenton asked who would build a house on or next to a restored gravel pit. Mr. Crotteau said he's trying not to be a lawyer but he recalled from law school that landowners are not able to use their property in whatever way they choose to get the maximum production of money. He said that's what the Planning Board is trying to get at, trying to balance the needs.

The Tie Vote Issue – Mr. Fowler said he didn't understand why the Planning Board did not go back to untie the vote. He said that the board should have tried to break the tie. Mr. Fenton said the Planning Board should not have let a tie vote stand. Mr. Wuorinen said it's obvious they can't preserve the landscape, but if they dig a pit, a berm with plantings has limitations. He said there are no perfect solutions. Mr. Fowler asked whether the berm was inside or outside the 50-foot setback. The board discussed this for a while and believed the berm was proposed to be within the 50-foot setback.

Mr. Crotteau said the Appeals Board is stuck with what to do with a tie vote. He said he would side the with Maine Municipal Association interpretation that if it's not an affirmative vote, it is a negative vote. Chairman Fenton said that's what the town attorney said.

Mr. Crotteau moved to accept the interpretation that a tie vote is not a vote in favor of this criterion. Mr. Wuorinen 2nd. **Vote in favor was 5-0.**

Mr. Crotteau moved to affirm the decision of the Planning Board in regard to Site Plan Review Ordinance criterion J1. Mr. Wuorinen 2nd. Mr. Fowler said it bothers

him that how a person decides to look at an issue is how this turns out. Chairman Fenton said the Planning Board could waive this provision, or not. Mr. Bragdon said the Planning Board did not waive this. Chairman Fenton said they could have. Mr. Fowler said the part that bothers him is that if the Planning Board treats one person this way, everyone should be treated this way. He said the Planning Board could use this criterion to defeat all gravel permits. Mr. Wuorinen said he did not think that follows. Mr. Fowler said all pit owners should be treated equally – he does not want to set a precedent. He said this standard is hard, it's a very vague area. He said he doesn't know what the standards will be. Mr. Bragdon said the Planning Board never set any conditions. He said a berm was proposed, and the standards are very subjective and he doesn't know what they are. Mr. Crotteau said you could say the Planning board has reviewed all the other pit applications and found this standard was met. He said history has not applied to every pit, and all the others have met this standard. Mr. Fowler said this standard came up on the last two applications. He said he would have left the trees intact. A brief discussion followed regarding the trees. Mr. Wuorinen moved the question, Mr. Crotteau 2nd. **Vote in favor of moving the question was 5-0.**

Vote on the motion above was 2 in favor, 3 opposed (Fowler, Fenton, Bragdon).

Secretary Marckoon said a decision still needs to be made.

Chairman Fenton moved to remand the decision to the Planning Board is it may have erred in respect to Site Plan Review Ordinance standard J1. Mr. Fowler 2nd. **Vote in favor was 3-2 (Wuorinen, Crotteau)**

Secretary Marckoon asked how the findings were to be communicated. Chairman Fenton said he felt the plan submitted by Gott was sufficient and the conditions could be met.

Site Plan Review Standard J16
Chairman Fenton said he checked out the Comprehensive Plan all day, which is part of review criterion J16. He gave a synopsis of the appellant and Planning Board arguments.

Mr. Fowler asked if the Comprehensive Plan is no longer in effect after 10-years. Mr. Bragdon said the 10-year limit means the state no longer recognizes the plan. Chairman Fenton said it is still a viable document. Mr. Bragdon said when he looked at Section 9G of the Comprehensive Plan,

The remainder of the town shall be classified Rural and Agricultural with rules similar to the current land use rules but more restrictive to commercial uses and encouraging to agricultural usage, permitting residential usage, including (but not limited to) bed and breakfasts, housing for the elderly, and nursing homes. This area would prohibit heavy industrial usages, quarrying and mining of all types but sand and gravel removal would still be permitted. Also prohibited would be new private dumps, automobile graveyards, and any usages that might lead to toxic waste contamination of the aquifer.

it refers to the Rural and Agriculture District, which says it should encourage agriculture and discourage commercial development, but sand and gravel removal is allowed. He

asked if the permit is held to that standard, what is there in that section that one would use to deny the permit.

Mr. Crotteau said that section of the Comprehensive Plan looks like zoning. Mr. Bragdon said the proposal is not a mine or quarry or heavy industry. He said there was some memoranda about how many acres are already mined, and he's not sure if this would tip the town over the edge. He said the proposal is still a sand pit.

Mr. Crotteau said his view is that this is part of the balancing the Planning Board has to do. He said pits could eventually encompass the entire area, and the Planning Board was trying to keep this area primarily residential and agricultural. He said they were not talking about the 1st pit with this application, but essentially the Planning Board was saying there are too many pits.

Chairman Fenton said if one looks at the court cases, the Comprehensive Plan is where they were struck down. He said the committee that formed the Comprehensive Plan used visionary statements, and that the Comprehensive Plan Committee was recommending adoption. He said the data in the Comprehensive Plan is 16-to-20 years old. He said he sees it like the courts have said that it hasn't been changed, and Ordinances are the working documents. He said he is apprehensive about using the Comprehensive Plan for a review standard. Mr. Wuorinen said there is one court case that says it is OK to use the Comprehensive Plan. Mr. Bragdon said he has no problem using the Comprehensive Plan, but he can't see where review standard J16 should be denied.

A brief discussion followed regarding the standards in the Rural and Agricultural Zone in Section 9G of the Comprehensive Plan.

Mr. Crotteau referred to the extended findings and conclusions of the Planning Board included in the Gott submission under tab 3. He said he thinks the Planning Board was trying to balance the extraction with the maintenance of the Rural and Agricultural Zone (RAZ). He said this is what the Planning Board is supposed to do. He said the Planning Board has allowed gravel pits in the RAZ over the years, and perhaps they are saying this is one too many, and does not seem to be needed. Mr. Wuorinen said this location is close to the school and in a heavily built area. He said there is traffic, noise, dust and an effect on the water supply. He said that's an important consideration in the decision process. He said it's practically in the middle of town.

Chairman Fenton asked how you could use the Comprehensive Plan to exclude a pit from a particular zone. Mr. Wuorinen said the Planning Board was looking at advantage versus disadvantage. Mr. Fenton said the Building and Land Use Ordinance might be the best way to put in a zone. He said the Comprehensive Plan is a vision statement. He said he agreed with what Mr. Wuorinen is saying, but to have teeth to say that a gravel pit can't be there, it should be within the land use ordinance. Mr. Wuorinen asked if you have to lie down and plea dead waiting for a miracle, or do you take action to take care of the town. He said there is a court precedent. He said he wants to stand up and say this is what needs to be done.

Mr. Fowler said the Planning Board said there were approximately 300-acres of gravel pits. He said this proposal replaces 30-acres being lost on an expired lease with 1% of the pit acreage total. He said the dirt in one area of a pit might be of a particular kind, and there are lots of different gravels, so such a pit could be very necessary. Mr. Wuorinen said that was not the basic argument of the Planning Board. Mr. Crotteau said it is not the Appeals Board's job to read sections out of the ordinances. He said the town passed those. He said Gott did not present an argument that the application complied with the Comprehensive Plan. He said he does not see how the Appeals Board can say the Planning Board did not do its job. Chairman Fenton said the Planning Board is instructed to do so by ordinance.

Mr. Crotteau moved to affirm the decision of the Planning Board in regard to section J16 of the Site Plan Review Ordinance. Mr. Wuorinen 2nd. **Vote in favor was 3-2 (Fowler, Bragdon opposed).** The Board said its finding was that the Planning Board followed the directive of the Site Plan Review Ordinance in regard to provision J16.

Gravel Ordinance – Section 7D(4)

Chairman Fenton gave a synopsis of the arguments from both the appellant and the Planning Board in regard to the above referenced section. Mr. Crotteau said it's very similar to the Site Plan Review item that was appealed in regard to landscape. Mr. Wuorinen moved to affirm the decision of the Planning Board relative to Gravel Ordinance Section 7D(4). Mr. Crotteau 2nd. **Vote was 2-3 (Fenton, Fowler, Bragdon opposed).**

Chairman Fenton moved to remand to the Planning Board its decision to deny based on Section 7D(4) of the Gravel Ordinance because the restoration plan presented by the appellant meets that standard. Mr. Fowler 2nd. **Vote was 3-2 (Crotteau, Wuorinen opposed).**

Chairman Fenton gave a brief synopsis of the ordinance and the appellant's and Planning Board arguments in regard to Gravel Ordinance Section 7D(6), that the proposed permit would not adversely affect surrounding properties. Mr. Bragdon said the value of the expansion is not that significant. Mr. Crotteau said what the Planning Board was trying to do is reflect the loss in value of adjacent properties. He said it was silly not to think there would not be a loss in value, the effect is quite evident. He said the Board was trying to value the two things, and the adjacent land owners were losing more than the gain in value to Gott.

Mr. Wuorinen said it's misleading to consider just adjacent landowners. He said many in the area can hear the tail gates, see the dust, and experience the additional traffic. He said whole sections of town are affected. Chairman Fenton said that's how the tax structure works. Mr. Crotteau said on review, the ordinance says surrounding properties.

Mr. Bragdon asked if the Planning Board could have determined the value of the properties. Mr. Crotteau said he didn't see that it had been done in this case, but apparently the Planning Board made some sort of determination in other cases.

Chairman Fenton said this is where the Gravel Ordinance might have some teeth, and the Planning Board might have to start to look at this criterion. Mr. Fowler asked if the assessors would downgrade the value of a house on a property next to a gravel pit.

Mr. Crotteau moved to affirm the decision of the Planning Board in regard to section 7D(6). Mr. Wuorinen 2nd. **Vote in favor was 4-1 (Fowler opposed).**

Chairman Fenton said in the letter from the Planning Board to the Appellant on January 5, 2011, there is a section that upsets him. He said the language is on page two of the letter. Mr. Crotteau said the resident vs. non-resident language is not necessary. He said he did not think it was necessary for the Planning Board to take this into consideration. Mr. Fowler said the gravel pit people are more discriminated against than any other in the country. He said it is the only business where hours are regulated. He said people choose to live here, and it's a free country. Chairman Fenton said he understands, but he also understands there are certain industrial activities that people take issue with. He said air brake noise and the like do not enhance things. He said there is discrimination, but the ordinance is trying to balance rights. A general philosophical discussion followed regarding noise and water quality.

Secretary Marckoon said he hoped to have the findings and conclusions ready to sign by next Wednesday.

Mr. Crotteau said someone needs to look at the ordinances, especially the Site Plan Review Ordinance. He said maybe more criteria are needed from the Comprehensive Plan to use in the Planning Board decision. He said enforcement of those conditions is a serious issue. Mr. Fowler referred to the Goat Farm next to his home in regard to landowner rights and protections.

It was suggested that the Appeals Board and Planning Board could meet to discuss these issues.

There being no further business, the meeting adjourned at 9:05 PM

Respectfully submitted,

Stuart Marckoon, Secretary
Lamoine Board of Appeals

Follow Up Note

At approximately 9:45 PM Chairman Fenton called Secretary Marckoon at home and said he wished to change his vote in regard to Site Plan Review Ordinance Section J-16. Secretary Marckoon advised Chairman Fenton to contact him at the town office the next day, which he did via e-mail as follows:

April 29, 2011

To the Members and Secretary of the Lamoine Board of Appeals:

At the BOA meeting last night we discussed 4 items of the Gotts Appeal for a gravel extraction permit. One of the items was the Site Plan criteria, namely Review Standard #16 "Conforms to the Comprehensive Plan".

At the meeting I was basing my vote on the fact that the Site Plan Review mandates that the Planning Board must consider #16 as a criteria. I then voted that since the Ordinance mandated the Planning Board use the Comprehensive Plan, I felt it necessary to vote for the motion. On the way home from the meeting I realized that I had erred and wished to change my vote.

During the meeting I had read a passage from the Site Plan Review Ordinance. In **J General Review Standards** the ordinance states:

"The board may waive the criteria presented in this section upon a determination by the board that the criteria are not applicable to the proposed action or upon a determination by the board that the application of theses criteria are not necessary to carry out the intent of this ordinance."

In light of the information presented by the Appellant and the letter from our attorney, there is compelling evidence that the Planning Board should of, and could of waived the #16 standard in this application. As the information that was presented to us showed that in all cases but one, the court rulings showed that using the visionary document (Comprehensive Plan) as a review criteria is not in accordance with the recent courts decisions. (It is interesting to note that the one case where the Comprehensive Plan was upheld relied mostly on the regulations of the Board of Environmental Protection.)
Even if the board used the Comprehensive Plan as a review criteria, the Rural and Agricultural area allows for gravel extraction in the location defined in the Comprehensive Plan. No evidence was submitted to the contrary.

Therefore, for the above reasons I wish to change my vote from the affirmative to the negative on the question involving review criteria J (16).

I apologize to the members for this inconvenience but realize that I have to vote according to the evidence provided - even if it took a little longer for me to realize my error. There are provisions in the Appeals Board Manual for this vote change to happen and I wish to avail myself of that provision. Additionally, I appreciate all the work all the members and secretary have performed in this untraditional appeal. You have all contributed to the betterment of our community and I thank you for your service.